FILED
MAR 3 1956
HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

October Term, 1955

No. 730

ORREN HULETT, *Petitioner*

v.

EMMITT L. BRINSON, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KARL M. DOLLAK,
Dupont Circle Bldg.,
Washington, D. C.,
*Attorney for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statement | 2 |
| Reasons for Granting the Writ | 5 |
| (1) The Court below erred in failing to reverse the trial court which had permitted testimony barred by the pretrial order and which resulted in error apparent of record | 5 |
| (2) The Court below erred in finding support for action of the trial court in facts which are not in the record and which, on their face, would not support the action if they were present | 11 |
| Conclusion | 11 |
| Appendix: | |
| (1) Order of Court below remanding to District Court | 1a |
| (2) Opinion of Court Below | 2a |


## CITATIONS


| | |
|---|---|
| Brest v. Philadelphia Transportation Co., 216 F. (2d) 331 | 8 |
| Chicago, Rock Island & Pacific Rwy. Co. v. Kifer, 216 F. (2d) 753 | 8 |
| Fernandez v. United Fruit Co., 200 F. (2d) 414, Cert. denied 73 S. Ct. 797, 345 U.S. 935 | 7 |
| Kilmer v. Gustafson, 211 F. (2d) 781 | 8 |
| Levine v. Mills, 114 A. (2d) 546 | 9 |
| Neese v. Southern Railway Co., No. 28, October Term 1955, decided Nov. 21, 1955, U.S. | 8 |
| Owen v. Schwartz, 177 F. (2d) 641, 85 U.S. App. D.C. 302 | 7 |
| United States v. Certain Parcels of Land, 149 F. (2d) 81 | 7 |
| Woods v. Richmond & Danville R.R. Co., 1 App. D.C. 165 | 9 |


## STATUTES


| | |
|---|---|
| 28 U.S.C., 1254 | 2 |
| 28 U.S.C., 2106 | 9 |

IN THE

# Supreme Court of the United States

October Term, 1955

---

No.

---

ORREN HULETT, *Petitioner*

v.

EMMITT L. BRINSON, *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The petitioner, Orren Hulett, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, dated December 22, 1955.

### OPINION BELOW

The opinion of the Court below has not yet been officially reported, but is set forth in the Appendix.

### JURISDICTION

The opinion and judgment of the Court of Appeals was rendered on December 22, 1955.

A timely petition for rehearing was filed, and denied by the Court of Appeals on January 11, 1956, and by its Order of February 2, 1956, it stayed the issuance of its opinion and judgment to and including March 2, 1956.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

## QUESTIONS PRESENTED

1. Whether it is incumbent upon a federal appellate court, where the error is apparent of record, to correct the judgment of a trial court entered upon the verdict of a jury, and arrived at on the basis of evidence which, though not in support of the verdict, was admitted without objection but completely in derogation of pre-trial proceedings theretofore had.

2. Whether a federal appellate court does not depart so far from the orderly bounds of judicial procedure as to deprive a litigant of the applicable rights of review, where, after remanding the cause to the trial Court for further proceedings, which are then undertaken, the appellate court, *sua sponte* and before the conclusion of the proceedings before the trial Court, renders its own opinion which cites as support therefore evidence which is diametrically opposed to what the record shows.

## STATEMENT

The respondent, Brinson, sued petitioner Hulett for malicious prosecution after the former had been arrested on a warrant for embezzlement sworn out by Hulett, and the Trial Magistrate before whom the matter came on for hearing decided not to present the matter to a Grand Jury.

The jury returned a verdict in the amount of $20,000 against Hulett whereupon petitioner filed a motion for judgment n. o. v. or for a new trial on the grounds that there was no competent and substantial evidence to sustain the verdict, and that the verdict was outrageously disproportionate to any wrong done. The trial court denied the motion and a request to order a remittitur, whereupon an appeal was taken to the Court of Appeals.

The appellate court ordered the trial court to entertain a motion for remittitur and to certify the proceedings thereon held, to the appellate court. Petitioner timely filed such a motion; briefs were filed in support of and in opposition thereto, and hearings thereon were held by the trial court, but while the trial court was in process of ruling on the motion and prior to certifying a record of the proceedings to the appellate court, that court rendered its opinion on the appeal.

The record in the trial court shows that on the basis of the complaint filed which commenced the action, and of the pre-trial proceedings held on the matter two years thereafter, testimony permitted in keeping with both showed conflicting evidence on only two items: the cost of procuring a bond for $1750, and the cost of legal counsel which may have amounted to anywhere from $1350 to $1850. Additional testimony was permitted on the following alleged losses, although no claim therefor had been made either in the complaint or in the pre-trial proceedings: (1) for an alleged loss of wages totalling $12,960, although plaintiff himself testified that he lost his job not because of the warrant which had been served on him, but pursuant to an

injunction which was procured against him in a civil action involving a receivership; (2) for an alleged loss of a $22,000 stock equity in *another* corporation which failed six months after the plaintiff was served with the warrant, and only because it was unable to pay its creditors; (3) for an alleged loss of income of $3600 from a post office substation which had been located on the premises of the above corporation and ceased operations only when the corporation itself ceased to exist; (4) for an alleged loss of $7500 suffered in the sale by plaintiff of his home, although he had listed it for sale five months before the warrant proceeding, giving the reason for selling that he had purchased a farm in North Carolina (where he now resides) and although a mathematical computation of the figures shown in the record shows a $4000 profit, rather than a $7500 loss, and (5) for alleged expenses incurred in moving to North Carolina six months after the incident.

As concerns these alleged losses also, the plaintiff's own testimony was that his attorney had arrived at the figures, and that the plaintiff went along with him.

Concerning any damages for alleged humiliation, disgrace or damage to plaintiff's reputation, the record is devoid of any testimony to support such an allegation, but to the contrary shows that the plaintiff was in difficulty with creditors in every business which he had ever run, that the Treasury Department had issued distraints against his every business because of failure or refusal to pay taxes, and that it was a long-standing habit of plaintiff to issue checks against insufficient funds, having issued over one hundred such checks on one account alone over a period of ten months.

## REASONS FOR GRANTING THE WRIT

### 1. The Court Below Erred in Failing to Reverse the Trial Court Which Had Permitted Testimony Barred by the Pretrial Order and Which Resulted in Error Apparent of Record

As to both questions presented for review, the allowance of the petition in the case at bar would afford the Court the opportunity to resolve an important basic question of appellate review and would be conducive to the fair and efficient administration of justice.

The complaint originally filed by plaintiff alleged injuries for which compensatory damages were sought, and which, summarized, were as follows:

1. Counsel fees.
2. Court expenses.
3. Mental and physical suffering.
4. Injury to his name and reputation.
5. Practical destruction of his "corporation."

The pre-trial order entered in the case limited the items of damage to the following:

1. Expenses for counsel fees.
2. Court costs.
3. Deterioration of health.
4. Permanent injuries to his business.
5. Injuries to his good name and reputation in the community.

On trial, evidence admitted in support of the above issues showed an alleged expenditure of between

$1350 and $1850 for counsel fees, and an undetermined amount paid for a bond in the amount of $1750. No other evidence was adduced in support of the items of alleged damage above listed.

However, evidence was permitted to show a loss of earnings of $12,960, although plaintiff himself testified that he did not lose his job because of the warrant, but pursuant to an entirely separate civil action for an injunction, and receivership, for neither of which it must be obvious he could have any cause of action against the defendant. Evidence was also admitted to show a loss of $3600 in income from a Post Office substation located in another corporation, which substation went out of existence six months after the warrant incident, and then only when the corporation itself failed because it could not pay its legal obligations, and in the failure of which corporation also, plaintiff was permitted to testify he lost a $22,000 stock equity. He was further permitted to testify to a $7500 alleged loss in selling his home, and for moving expenses of $350 to move to North Carolina.

The testimony so admitted contrary to the supposed scope to which the pre-trial order would limit it, in effect permitted the jury to ponder the question of compensatory damages for injuries allegedly resulting in damages to the plaintiff for items totalling $46,410 more than any items of damage upon which testimony should have been limited to by the complaint and the pre-trial order.

Courts have long held that when the issues are formulated at a pre-trial hearing and the court is required to enter an order reciting such action, such pre-trial order, when entered, controls the subsequent

course of the action. See *Owen* v. *Schwartz,* 177 F. (2d) 641, 85 U.S. App. D.C. 302; *Fernandez* v. *United Fruit Co.,* 200 F. (2d) 414, Cert. denied 73 S. Ct. 797, 345 U.S. 935.

To permit the verdict rendered in this case to stand in the face of the facts as recited, is tantamount to saying that the jury would have been justified in returning a $20,000 verdict irrespective of whether the alleged items of damages to the plaintiff amounted to an approximate $1350 to $1850 and as to which items alone testimony should have been permitted the plaintiff, or whether they actually considered an additional alleged $46,410 in damages, none of which were pertinent to the issue and as to which testimony should have been precluded.

It is respectfully contended that the situation prevailing in the instant case is similar to that prevailing in the case decided in *United States* v. *Certain Parcels of Land,* 149 F. (2d) 81, 82, the trial of which was apparently fraught with error, and as to which the court said:

> "The departures here were so great though, the case went so far out of bounds, and the verdict was in amount so in excess of any of the substantial relevant evidence in the case, as to require the court, though objection was not timely made, Idem., to notice and correct the error. * * * Under all the circumstances, including the excessive verdict, these errors cannot be regarded as harmless, and therefore, not reversible * * *. (83) This is not a case of passion or prejudice on the part of the jury. It is a case merely of their being led through a confused record to a confused result. Taking the evidence as it came in, piecemeal, and, without guide and instruction, left to

reach their result by adding together the unrelated pieces of testimony, the jury was misled not by passion and prejudice but by unassisted ignorance into finding the verdict that it did."

**2. The Court Below Erred in Finding Support for Action of the Trial Court in Facts Which Are Not in the Record and Which, on Their Face, Would Not Support the Action If They Were Present**

The Court of Appeals, in its opinion which it issued *sua sponte* after having remanded the matter back to the District Court for further proceedings, came to the conclusion that apparently the rule in Federal courts is that "an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand." Citing *Kilmer* v. *Gustafson,* 211 F. (2d) 781, *Brest* v. *Philadelphia Transportation Co.,* 216 F. (2d) 331, and *Chicago, Rock Island & Pacific Rwy. Co.* v. *Kifer,* 216 F. (2d) 753.

Petitioner agrees with the basic holdings in these cases but respectfully submits that the facts therein are not similar to those in the case at bar.

By the same token, we are in accord with this Court's holding in the case of *Neese* v. *Southern Railway Co.,* No. 28, October Term, 1955, decided November 21, 1955, U.S. , in which also this Court found support in the record for the action of the trial court. However, here again, we believe that case lends little support to the opinion of the Court below in the case at bar, as can be shown by an examination of the "facts" which the Court cited as basis for support.

Perhaps the Court below felt itself restrained, in ordering a remittitur, by the language in the case of

*Woods* v. *Richmond & Danville R. R. Co.*, 1 App. D.C. 165, wherein the court stated:

> "It is only in those cases where the findings of the jury may be separated into distinct parts or *where errors readily discernible and separable may have increased a finding,* that we would feel ourselves clearly justified in directing or permitting a remittitur of a part." (Emphasis supplied.)

Nevertheless, that court ordered a new trial in lieu of ordering a remittitur, as did the Municipal Court of Appeals for the District of Columbia in *Levine* v. *Mills,* 114 A. (2d) 546. The Court below was certainly capable of ordering a new trial in lieu of proceeding on the question of remittitur, where a proper review of the record of proceedings in the trial court would have shown clearly that the facts required "such further procedings—as may be just under the circumstances." 28 U.S.C.A. Sec. 2106.

Instead, the Court below, in justification of its Opinion, referred to items which were allegedly in support of the action of the trial court, but which items, however, are either not in the record, or are completely incapable of being used to support the action of the trial court. Taking these up in order: the Court below referred to testimony concerning the alleged humiliation, disgrace and damage to reputation suffered by the plaintiff. In fact, however, the record contains no testimony as to disgrace or damage to the reputation of the plaintiff, and the only possible reference to humiliation was that the plaintiff was served with the warrant for embezzlement in the variety store of which he was the manager.

Further the Court's opinion attributes to the plaintiff testimony to the effect that "as a direct result of the arrest, he lost his job and, being unemployed for two years, suffered a loss of money totaling $12,960.00." In fact, however, the plaintiff himself testified that he did *not* lose his job as a direct result of the arrest, but that he lost it pursuant to a subsequent civil action involving an injunction and a receivership. Surely, therefore, the sizable sum of money involved in that alleged loss cannot in any way be attributed to the case at bar.

The Court further went on to say *"after his arrest* (emphasis supplied) appellee lost another source of income, which he was receiving for operating a division of the Post Office Department, this loss of wage income being estimated at $3,600 * * *." The Court, as to this item, again failed to perceive that "after his arrest" was actually six months after the warrant incident, and that the plaintiff lost that source of income only when the division went out of existence because the premises of the corporation in which it was located were vacated when the corporation went out of business because of its inability to pay its current creditors.

Still further, the Court's opinion went on to say that the effect of the arrest of plaintiff "was to scare his creditors and this resulted in destroying *one of his stores* (emphasis supplied) as a source of income, which loss he approximates at $22,000.00." The Court again failed to perceive, first, that the timing involved was six months after the warrant incident and second, that "one of his stores" was in fact a corporate entity, as shown by the record, and that if, in fact, any injury

had been caused to that corporation, that the plaintiff, as an individual would have had no cause of action on its behalf.

As concerns the Court's reference to the plaintiff's allegation that he was forced to sell his home at a loss of $7500 and incur moving expenses of $350, the record shows an actual profit by the plaintiff of $4000, and that he had planned, almost five months before the incident, to move to North Carolina, where he now resides.

The Court below thus supported its affirmance of the action of trial court by facts which are not in the record or which have no pertinence to the case where they were erroneously permitted to be injected by the trial court.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KARL M. DOLLAK,
Dupont Circle Bldg.,
Washington, D. C.,
*Attorney for Petitioner*

# APPENDIX

# APPENDIX

## APPENDIX

---

Filed June 20, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

April Term, 1955

No. 12,513

---

ORREN HULETT, *Appellant,*

v.

EMMITT L. BRINSON, *Appellee.*

---

Before: Bazelon, Washington and Bastian, Circuit Judges.

**Order**

This case came on for consideration on the transcript of the record from the United States District Court, and was argued by counsel.

Upon consideration whereof, and it appearing to this Court that before entry of a final judgment in this appeal it would be just to require further proceedings in the District Court (28 U.S.C. 2106), it is ORDERED by the Court that this case be, and it is hereby, remanded to the said District Court with directions to entertain a motion for remittitur and upon the conclusion of such hearings and proceedings as may be necessary in the disposition of that motion, said District Court shall promptly certify to this Court a transcript of said proceedings, and of the order disposing of said motion.

PER CURIAM.

Dated: June 20, 1955.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 12,513

ORREN HULETT, APPELLANT

v.

EMMITT L. BRINSON, APPELLEE

---

Appeal from the United States District Court
for the District of Columbia Circuit

---

December 22, 1955

*Mr. Karl M. Dollak* for appellant.

*Mr. E. Willard Hyde*, with whom *Mr. Mario S. Romero* was on the brief, for appellee.

Before BAZELON, WASHINGTON and BASTIAN, *Circuit Judges.*

BASTIAN, *Circuit Judge*: Appellee-plaintiff, Brinson, sued appellant-defendant, Hulett, for malicious prosecution. The jury returned a verdict, and judgment was entered for the plaintiff against the defendant in the amount of $20,000.00. Thereafter, the defendant filed a motion for judgment n.o.v. or for a new trial, contending that there was no substantial and competent evidence to sustain the verdict; that there was no competent and substantial evidence to sustain the amount of damages awarded to plaintiff; and that the damages are "patently excessive and [were] obviously granted in complete disregard of the testimony, and outrageously disproportion-

ate to any wrong done." The trial court was also requested to order a remittitur. The defendant's motions were denied, and this appeal followed.

The defendant claims three errors: (1) that the trial court erred in not directing a verdict for the defendant; (2) that the trial court erred in denying defendant's motion for a new trial, or for a remittitur, by failing to recognize the great disparity between the facts and the jury's award, thereby constituting an abuse of discretion amounting to an error of law; and (3) that the trial court erred in not excluding reference to defendant's garb and a defamatory reference to the alleged extra-marital status of a main witness for the defendant.

We feel that there was no error in the failure of the trial court to direct a verdict for the defendant, nor do the remarks of plaintiff's counsel or the actions of the trial judge with regard thereto justify reversal.

We come then to defendant's claim that there was error in the denial of the motion for a new trial, or for a remittitur.

Ordinarily, an appellate federal court will not review the action of a trial court in granting or denying a motion for a new trial on the grounds of inadequacy or excessiveness of verdict. *Coca Cola Bottling Works* v. *Hunter,* —— U. S. App. D. C. ——, 219 F.2d 765; *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474 (1933); *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, 86 F.2d 836.

This court, in *Woods* v. *Richmond & Danville R. R. Co.,* 1 App. D. C. 165, dismissed an appeal from an order of the District Court setting aside a verdict for the plaintiff (appellant) and granting a new trial. The jury had rendered a verdict for the plaintiff in the amount of $13,000.00 for damages for injury resulting in the loss of a

foot. The defendant had moved for a new trial on the ground that the verdict was excessive and against the weight of evidence. No offer was made by plaintiff to remit any portion of the damages found until the hearing before this court, when it was suggested that if the court were satisfied that the verdict was in accordance with the evidence, but excessive in amount, the plaintiff would enter a remittitur of such amount as might be reasonable. The court found conflicting evidence but enough testimony on behalf of each party to sustain a judgment for either. The court pointed out that it is difficult for an appellate court to come to a satisfactory conclusion concerning the credence and weight to be given to the respective witnesses, and that the action of the trial court ought not to be disturbed by an appellate court save upon conclusive reasons. Finding discretion in the trial court in setting aside a verdict and awarding a new trial, the court stated:

> "While it is probable, the motion may have been sustained upon the ground only, that in the opinion of the court, the verdict was excessive in amount; still there is nothing in the record which would authorize us to indicate any amount of probable excess, upon the entry of a *remittitur* of which the judgment might be here rendered for the remainder. To do so in this case would be to usurp the functions of the jury. It is only in those cases where the findings of the jury may be separated into distinct parts, or where errors readily discernible and separable may have increased a finding, that we would feel ourselves clearly justified in directing or permitting a *remittitur* of a part." (at pp. 169-70)

Even though the trial court in the *Woods* case set aside the verdict of the jury and awarded a new trial, the language quoted above, as to the function of an appellate court in ordering a remittitur, is appropriate.

The defendant cites *Boyle* v. *Bond*, 88 U. S. App. D. C. 178, 187 F.2d 362, wherein this court reversed an order of the trial court and remanded the case for new trial

unless the plaintiff filed a remittitur of $6,809.06 within ten days. The court held that the verdict on an action for a breach of contract was grossly excessive under the evidence. Defendants (appellants) had moved for a new trial, attacking the verdict as grossly excessive, the motion being denied. The court cited 28 U.S.C.A. Sec. 2106 as authority for its action. That section reads as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

In the *Boyle* case the court found that the claim for commissions due was susceptible of and required proof of a definite amount, and that the damages could be proven with a fair degree of certainty. It was also held in that case that the trial court failed to recognize the great disparity between the proof and the jury's award, which constituted a technical abuse of discretion amounting to an error of law. In finding abuse of discretion, the court reversed and remanded the cause for new trial unless the appellee preferred to settle the matter by filing a remittitur within ten days in the Court of Appeals, in which event the judgment would stand affirmed.

In state courts there is apparently an established practice of ordering a remittitur in appellate courts, even in tort cases where the damages are unliquidated; but in federal jurisdictions the practice seems to be limited to contract cases and the like, where the excess amount of the verdict can be fairly well determined.[1] No case has

---

[1] *United States Potash Co.* v. *McNutt*, 70 F.2d 126 (10th Cir. 1934); *Lalley* v. *Escoett*, 79 U.S. App. D.C. 306, 146 F.2d 667; *United States* v. *Certain Parcels of Land, etc.*, 149 F.2d 81 (5th Cir. 1945).

been found in a federal jurisdiction where an appellate court undertook to cure by remittitur an excessive verdict rendered in a tort action for unliquidated damages.[2]

In the recent case of *National Alfalfa Dehydrating & Milling Co.* v. *Sorensen*, 220 F.2d 858 (8th Cir. 1955), the court in citing *Glendenning Motorways* v. *Anderson*, 213 F. 2d 432 (8th Cir. 1954),[3] held that in the Federal courts alleged excessiveness of verdict in tort cases was not reviewable on appeal.

It appears clear that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand.[4]

---

[2] See *Levine* v. *Mills*, 114 A.2d 546, wherein the Municipal Court of Appeals for the District of Columbia, recognizing this fact, found that their only course was to remand for a new trial.

[3] In *Glendenning* the court said: "It is finally contended that the verdict is excessive and that a new trial should be granted for that reason. We have consistently held that in a tort action the question of the excessiveness of a verdict is a question to be determined by the trial court on motion for new trial and cannot be considered as ground for reversal. (Citing cases.) In the instant case a motion for new trial was presented to the trial court on the ground among others that the verdict was excessive. . . . While the matter is not properly before us we observe in passing that the verdict cannot properly be said to be 'monstrous' nor such as 'shocks the judicial conscience', and that manifestly was the view of the trial court." (213 F.2d at 437.)

[4] *Kilmer* v. *Gustason*, 211 F.2d 781 (5th Cir. 1954), where the court said: "Appellants also assert that the judgments are excessive, and should for that reason be reversed, citing several Iowa cases to support the charge of excessiveness. A federal appellate court, however, does not undertake to determine whether a verdict is excessive in fact, but only whether the district court abused its discretion as a matter of law in granting or refusing a new trial on the ground of excessiveness. (Citing cases.) Certainly it can not be said that these judgments are so inordinately excessive as to be

In the recent case of *W. W. Neese, Administrator* v. *Southern Railway Co.*, the situation was this: A jury verdict had been obtained in the United States District Court for the Eastern District of South Carolina in the amount of $60,000.00 in an action for wrongful death. The District Judge ordered a remittitur in the sum of $10,000.00, which remittitur was filed, judgment thereupon being entered for $50,000.00. Appeal was taken to the United States Court of Appeals for the Fourth Circuit, which reversed on the ground that the judgment was excessive and sent the case back for a new trial on the ques-

---

contrary to reason, or the result of sympathy, passion, or prejudice, so as to render them excessive in law." (At 783-84.)
*Brest* v. *Philadelphia Transportation Co.*, 216 F.2d 331 (3d Cir. 1954), where the court said: "It is to be borne in mind that our function on an appeal is not the same as that of the trial judge. In his discretion he may order a new trial if he thinks a verdict excessive. Fed. R. Civ. P. 59(a), 28 U.S.C.A. In this case the trial judge thought that the verdict was more than he would have given but was not sufficiently excessive to shock his conscience. As this Court has stated in Trowbridge v. Abrasive Co. of Philadelphia, 3 Cir., 1951, 190 F.2d 825, 830, we will not substitute our judgment for that of the trial court as to whether the verdict is excessive. Our function is to determine whether the verdict is so grossly excessive as to justify reversal on the ground that the denial of the motion for a new trial constituted an abuse of discretion. *Ibid.* We find no abuse of discretion in what the trial court did here." *Chicago, Rock Island & Pacific Rwy. Co.* v. *Kifer*, 216 F.2d 753 (10th Cir. 1954), cert. denied, 348 U.S. 917, where the court said: "A Circuit Court of Appeals may not review the action of a District Court in granting a motion for a new trial on the ground the damages awarded by the jury were excessive, because that is an error of fact. (Citing Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474.) Our province is limited to determining whether the trial court, in denying the motion, abused its discretion. Ordinarily, it will not be held that the trial court abused its discretion in denying a motion for a new trial on the ground that the verdict was excessive, unless it affirmatively appears that it resulted from bias, prejudice, or passion." (216 F.2d at 756-57.)

tion of damages only. The Supreme Court[5] reversed, saying:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

Tested by this standard, we hold that the action of the trial court in the present case, in denying the motion for a new trial on the ground that the verdict was excessive, "was not without support in the record." While the verdict is certainly substantial, there was evidence which, if believed by the jury (as it apparently was), justified such a recovery. In addition to the humiliation, disgrace and damage to reputation, appellee testified to the following special damages:

While working at the Brinson, Incorporated, store he was publicly arrested and placed in jail; as a result of being jailed, he was compelled to post a $1,750.00 bond;

---

[5] *W. W. Neese, Administrator* v. *Southern Railway Co.*, No. 28, October Term, 1955, decided Nov. 21, 1955, —— U.S. ——. Cf. also *Snyder* v. *United States*, No. 40, October Term, 1955, decided Dec. 5, 1955, —— U.S. ——, where the appellate court (218 F.2d 266 [4th Cir. 1954]) had reduced non-jury damage awards of $8,000.00 each (in addition to funeral expenses) for pecuniary loss to parents resulting from the wrongful deaths of an eight-weeks old child and a six-year old child, reducing the award to $5,000.00 each (in addition to funeral expenses). The Supreme Court, by order and without opinion, reversed the Circuit Court and reinstated the judgment of the District Court.

due to the charges he had to pay $1,850.00 as expenditures for his defense; thereafter and, according to appellee, as a direct result of the arrest, he lost his job and, being unemployed for two years, suffered a loss of money totalling $12,960.00; after his arrest appellee lost another source of income, which he was receiving for operating a division of the Post Office Department, this loss in wage income being estimated at $3,600.00 by appellee; the effect of his arrest was to scare his creditors and this resulted in destroying one of his stores as a source of income, which loss he approximates at $22,000.00; finally, appellee had to move his family out of the community and he was forced to sell his house at a loss of $7,500.00, with moving expenses in the amount of $350.00.

It is true that many of these items were disputed but the fact remains that the jury apparently believed appellee was substantially damaged by appellant's action.[6]

We cannot say that the able trial judge abused his discretion in failing to order a new trial because of the excessiveness of the verdict or in failing to order a remittitur.

AFFIRMED.

[6] It is to be noted that the damages awarded were compensatory only, no punitive damages being claimed or awarded.

FILED
MAR 2 6 1956
HAROLD B. WILLEY, Cl

IN THE

# Supreme Court of the United States

October Term 1955

---

No. 730

---

ORREN HULETT, *Petitioner*,

v.

EMMITT L. BRINSON, *Respondent*.

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

E. WILLARD HYDE
MARIO S. ROMERO
1319 F Street, N. W.
711 International Building
Washington, D. C.
*Counsel for Respondent*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Questions Presented | 1 |
| Counter-Statement of the Case | 2 |
| Reasons For Refusing the Writ | 5 |
| Request For Damages for Delay | 7 |
| Conclusion | 7 |


## TABLE OF CASES


| | |
|---|---|
| Loews vs. Cinema Inc., 347 U.S. 976 | 6 |
| W. W. Neese Administrator vs. Southern Railroad Co., No. 28, 100 Lawyers Ed. 93 | 6 |
| Snyder vs. United States No. 40 (1955) United States Supreme Court Decided December 5, 1955 | 6 |


## RULES


| | |
|---|---|
| Rule 56(4) of the United States Supreme Court | 7 |

IN THE

# Supreme Court of the United States

October Term 1955

---

No. 730

---

ORREN HULETT, *Petitioner*,

v.

EMMITT L. BRINSON, *Respondent*.

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Where a District Court denies a request for a remittitur, after substantial argument, and the Court of Appeals, on appeal, finds that the District Court did not abuse its discretion in refusing to order a remittitur and where the evidence on damages far exceeded

the amount of the jury's verdict, and where damages were unliquidated, is any question presented to justify exercise of this Court's certiorari jurisdiction?

2. Where an appellant, through failure to bring before the Court of Appeals a complete record of the trial proceedings, misleads the Court of Appeals into think that the District Court had not entertained a request for a remittitur; and where the Court of Appeals, under such misapprehension, orders the District Court to entertain a request for a remittitur; and where the Court of Appeals, having thereafter discovered the true facts that a request for a remittitur had been entertained and after substantial argument had been denied; is it error for the Court of Appeals to then issue its judgment affirming the decision of the District Court, without awaiting the completion of the second remittitur proceeding?

## COUNTER STATEMENT OF THE CASE

The respondent for over 20 years a business man in the field of variety stores was arrested in public and jailed upon two warrants of arrest (embezzlement and trespass) filed by Petitioner. The Respondent was found not guilty by a Trial Magistrate in Virginia. The Respondent brought suit against Petitioner in the United States District Court for the District of Columbia for false imprisonment and for malicious prosecution. In the pleadings and at pre-trial Respondent requested $50,000.00 damages for, inter alia, mental and physical suffering, injury to his name and reputation, permanent injuries to his business. The case was first tried before Judge Bailey but resulted in a hung Jury. The case was again tried before Judge Tamm and the jury returned a verdict of $20,000.00.

On March 19, 1954 Petitioner filed a Motion for a Judgment N.O.V. and for a New Trial based on insufficiency of evidence and excessiveness of damages. Arguments were had on March 26, 1954 at which time Petitioner incorporated in open court a Motion for a Remittitur (Page 36 of the Certified Record of Proceedings before Judge Tamm on March 26, 1954). At this time the Petitioner argued about the disputed testimony and dwelled on the excessiveness of damages, while the Respondent argued that there was evidence before the jury to substantiate the following items of damages: Cost of placing bond for $1,750.00; Defense Counsel and accounting expenses amounting to $1,850.00; loss in the amount of $7,500.00 for premature sale of house at a loss; expenses in the amount of $350.00 for having to move his family out of the community; loss of wages for two years amounting to $12,960.00; loss of income by losing contract with U. S. Post Office in the amount of $2,700.00; loss of destruction of Respondent's business in the amount of $22,000.00, all of these damages exclusive of deprivation of liberty, circumstances of aggravation and mental suffering, physical suffering, injury to fame, reputation and character, general impairment of social, mercantile standing and credit; shame, embarrassment, worry and humiliation caused by criminal proceedings until they remained undetermined. Respondent further pointed out that there was sufficient evidence to establish the connection between the tortious conduct of Petitioner and the loss of credit, the loss of income, that the creditors upon knowing of the criminal proceedings started to put pressure on Respondent and were responsible for the damages alleged. The trial judge after considering all this said

in denying the Motion for a New Trial and the Request for a Remittitur "The Court cannot say that there was not competent evidence upon which the jury might make the finding that they did."

When the Court of Appeals received the record for review it was naked of the transcript of the proceedings of the request for a remittitur, and the pleadings, of course, did not themselves contain a "request for a remittitur". The Court of Appeals was misled by the insufficiency of the record before it in believing that the trial judge did not entertain a motion for a remittitur and therefore issued its Order of June 20, 1955 directing the District Court to entertain a request for a remittitur under a misapprehension. The Respondent corrected the failure of Petitioner by filing the full transcript of the proceedings indicating that the trial judge had in fact entertained such a request for a remittitur on March 26, 1954 and had denied it. When the Court of Appeals became aware that through their Order of June 20, 1955 they were requesting the trial judge to entertain a request for a remittitur identical to one already denied, there was issued without further explanation the Decision of December 22, 1955 indicating therein at page 3a (Petitioner's Brief) "The trial court was also requested to order a remittitur."

The Petitioner then Petitioned the Appellate Court for a Rehearing and it was denied. After the Appellate Court mailed certified copy of its opinion to the District Court in lieu of the mandate, and when the District Court was about to hear a Motion for Judgment Against Surety on a Supersedeas Undertaking, the Petitioner requested the mandate be recalled to enable him to file this Petition, we believe with the pur-

pose to enable him to delay proceedings and engage the respondent in further litigation in the State of Michigan.

## REASONS FOR REFUSING THE WRIT

The present Petition contains no special or important reasons why the Writ should be granted. The issues presented are neither novel nor transcendental. The Petition represents nothing more than an attempt by a losing party in a malicious prosecution action to obtain another appellate review of the judgment against him and also, we believe, represents an effort to delay execution of the judgment against him.

1. The $20,000.00 jury verdict was the result of a well conducted trial with a jury carefully instructed as to the law of the action and of the damages. The relief requested in the pleadings and at the pre-trial conference and as reflected in the instructions to the jury substantiate the jury verdict. On March 26, 1954 upon a hearing before the trial judge on a Motion for a Judgment N.O.V. or for a New Trial combined with a request for a remittitur, the trial judge heard arguments and considered the matter of damages and the excessiveness of the verdict and the insufficiency of the evidence and concluded that the verdict was substantiated by the evidence. The Court of Appeals concluded that the "able trial judge" did not abuse his discretion in failing to order a remittitur. The Appellate Court, in reviewing the discretionary powers of the trial court, properly made no effort to judge the credibility of the witnesses or weigh conflicting evidence but took the view of evidence most favorable to the prevailing party and upheld the verdict as

supported by substantial evidence. This is clearly the appropriate method and scope of review. (Loews vs. Cinema Inc. 347 U.S. 976) W. W. Neese Administrator vs. Southern RR Co. No. 28, 100 Lawyers Edition 93, and Snyder vs. United States No. 40 United States Supreme Court decided December 5, 1955.

2. It is our contention that the Petitioner misled the Appellate Court in believing that the trial judge had not entertained a request for a remittitur when the Petitioner failed to include in the Appellate Record the proceedings had before the trial judge on March 26, 1954 upon a Motion for a Judgment N.O.V. and for a New Trial at which time the Petitioner requested the trial judge in open court to consider a remittitur. The Appellate Court, therefore, issued its Order of June 20, 1955 under a misapprehension of fact and instructed the trial court to entertain a remittitur. It is our contention that once the Court of Appeals discovered the true facts that a request for a remittitur had been already entertained and after substantial argument had been denied, that it was within their power to correct the embarrassing position they had been placed by Appellant, and that there was therefore no need to await the completion of the second remittitur proceedings. It is our contention that the procedural conduct of the Court of Appeals was appropriate and that their judicial query into the case had been answered to their satisfaction. The Petitioner, therefore, has no cause to complain that the Decision of the Court of Appeals of December 22, 1954 deprived him of a second ruling on the same request for a remittitur.

3. Petitioners argument that the relief requested in the complaint was limited by the pre-trial order is without merit and this legal theory was never brought before the Appellate Court for consideration.

## REQUEST FOR DAMAGES FOR DELAY

Respondent hereby moves the Court for an Award of Damages pursuant to Rule 56(4) of the Rules of this Court, if the Petition for Writ of Certiorari be denied upon the ground that it is manifest that there was no ground for granting such a writ.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

E. WILLARD HYDE
MARIO S. ROMERO
1319 F Street, N. W.
711 International Building
Washington, D. C.
*Counsel for Respondent*